Erman Corporation *and* Roy McNish and David Mills, Petitioners, and USWA, Local 4991, District 11. Case 17–RD–1558

November 24, 1999

DECISION AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held June 15, 1999, and the hearing officer's report (of which pertinent portion are attached) recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 0 for and 5 against the Union, with 16 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings and recommendations.

We agree with the hearing officer that the challenged voters, all of whom are unreplaced former economic strikers, are not barred from voting under Section 9(c)(3) of the Act, although the election was conducted more than 12 months after the commencement of the strike. Under *Gulf States Paper Corp*., 219 NLRB 806 (1975), an economic striker retains his eligibility to vote even after the 12-month period set forth in Section 9(c)(3), if he has not been permanently replaced.

We further agree with the hearing officer that the Employer has failed to show that it has permanently abolished the jobs of the challenged voters for economic reasons. The Employer presented evidence that it experienced a downturn in business for several months during the strike, due to a temporary interruption in the supply of railcars available for it to purchase. The record shows, however, that throughout the eligibility period and continuing until the hearing in this case the number of railcars available for the Employer to purchase on a monthly basis was similar to the number supplied to the Employer on a monthly basis during the 12-month period prior to the strike. Furthermore, although the Employer contends that the supply of railcars is uncertain and may diminish in the future, it has not shown that it is in any different position in this respect than it was prior to the strike. Rather, the record reveals that the Employer has experienced both upturns and downturns in its business. When it has experienced downturns, it has laid off unit employees. During times of expansion, it has recalled employees pursuant to the provisions of its collective-bargaining agreement with the Union. Under the most recent collective-bargaining agreement, unit employees retain recall and seniority rights for 2 years.

The Employer makes the additional argument that it has changed its method of operation so that it is able to handle its production needs with its current work force. Accepting as true the Employer's contention that, by combining tasks and increasing flexibility among its employees, it is now able to process the same number of railcars with 5 employees as it processed with approximately 30 unit employees prior to the strike, we nevertheless find that the Employer has failed to show that it has permanently abolished the jobs of the 16 challenged voters. The Employer's argument rests on the assumption that its volume of business will either remain stagnant or will decrease. As noted above, however, the Employer has experienced both upturns and downturns in its business. At the hearing, the Employer admitted that it had hired several temporary employees during and after the strike. It also admitted that in the future it would need to hire up to three additional temporary employees to handle its anticipated volume of business.

As the Board reasoned in *Gulf States Paper Corp*., supra at 807, "a striker's basic right to a job cannot depend upon job availability as of the moment he applies for reinstatement." Quoting *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1975). Before disenfranchising employees who might otherwise be eligible to vote, the employer's burden is to show that their jobs were *permanently* eliminated. It is not sufficient to show a lessened need for employees due to current conditions that may only be of a temporary nature. *Globe Molded Plastics Co.*, 200 NLRB 377 (1972). Applying these principles, we find, contrary to our dissenting colleague, that the Employer has not shown that it eliminated the jobs of the challenged voters. Accordingly, we adopt the hearing officer's recommendation to overrule the challenges to their ballots.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 17 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Ed Underwood, Melvin Lomax, Isidro Cerros, Evaristo Valles, Doy Savage, Oscar Corral, Manuel Benitez, George Criss, Amador Silva, Hipolito Martinez, Jose Diaz, Gary Freeman, Eulogio Aguilar, Vernon Long, Jesus Aros, and Ed Gomez; serve on the parties a revised tally of ballots; and issue the appropriate certification.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues and the hearing officer, I would sustain the Employer's challenges to the ballots of the 16 voters. I conclude that these 16 former economic strikers were not eligible voters.

The Employer sets forth two arguments in support of its position that the challenges should be sustained. First, it contends that the challenged voters are ineligible because the election was conducted more than 12 months after the commencement of a strike in which the challenged voters participated. Second, the Employer argues that the challenged voters are ineligible because their

positions have been eliminated and they have no reasonable expectation of recall.

Like my colleagues and the hearing officer, I reject the Employer's first argument. Under *Gulf States Paper Corp.*, 219 NLRB 806 (1975), an economic striker retains his eligibility to vote even after the 12-month period set forth in Section 9(c)(3), if that voter has not been permanently replaced. Since these 16 former economic strikers have not been permanently replaced, Section 9(c)(3) does not preclude them from voting.

However, I agree with the Employer's second argument. Under *Lamb-Grays Harbor Co.,* 295 NLRB 355 (1989), economic strikers, like other employees, lose their eligibility to vote if the employer eliminates their jobs for economic reasons.

Here, the Employer presented uncontradicted evidence that it has eliminated the jobs for economic reasons. It has changed its method of operation. It is currently operating with its five regular employees, occasionally supplemented by a few temporary employees. It has sold off several large pieces of equipment, and it has combined tasks and increased flexibility among its employees. For the foreseeable future, it anticipates continuing to operate in this manner.

The hearing officer concluded that the Employer has not met its burden of showing that the 16 challenged voters' jobs have been eliminated. I disagree. As noted, the Employer testified, without contradiction, that it intended to operate as it does now. In response, the hearing officer could point only to the fact that the Employer continues to solicit business and maintains its prestrike physical plant. Neither of these facts nullifies the Employer's testimony. The mere fact that the Employer continues to solicit business is not inconsistent with an intention to retain the present scope and method of operation. An enterprise must continue to solicit customers if it is to survive. It is, of course, possible that the solicitation will be so successful as to warrant expansion. But that is a mere possibility in this case, not a reasonable likelihood.[1] Further, the fact that the Employer has not sold the plant is not inconsistent with its stated intention to retain the status quo. The retention of the plant suggests only that the Employer maintains a *capacity* to expand—not that the 16 voters have a reasonable expectation of recall.

My colleagues assert that the Employer has experienced downturns and upturns in its business, and that it has laid off and recalled employees accordingly. My colleagues have missed the point. The Employer in this case is not simply saying that there has been an economic downturn. Rather, it is saying that it has made a change in its method of operation. And, it is not simply saying this. It has testified, without contradiction, that this change has occurred, and it has made changes which are consistent with this testimony.[2]

In sum, given the Employer's uncontradicted testimony that it will be able to handle its production needs with its current work force, and in light of the actions that the Employer has taken toward that end, it is plain that the 16 employees do not have a reasonable expectation of recall. I would sustain the Employer's challenges and certify the results of the election.

APPENDIX

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS

The ballots of the following voters were challenged: Ed Underwood, Melvin Lomax, Isidro Cerros, Evaristo Valles, Doy Savage, Oscar Corral, Manuel Benitez, George Criss, Amador Silva, Hipolito Martinez, Jose Diaz, Gary Freeman, Eulogio Aguilar, Vernon Long, Jesus Aros, and Ed Gomez.

The Employer contends that the challenges to the ballots of the above-named employees should be sustained on two basis. The Employer's first basis for arguing that the 16 challenged voters are ineligible is purely a legal argument. The Employer argues that the challenged voters are ineligible because the election was conducted later than 12 months from the commencement of the strike at the facility. Citing Section 9(c)(3) of the Act, the Employer contends that replaced strikers are eligible to vote if the election is held within 12 months of the commencement of the strike, but posits that after 12 months, the Act makes no provision for the continuing eligibility of any striker. The Employer argues that the Board's decision in *Gulf States Paper Corp.,* 219 NLRB 806 (1975), should be overruled. In *Gulf States* the Board ruled that an economic striker retained his eligibility to vote past the 12 months set out in Section 9(c)(3), if that voter was not permanently replaced. The Employer argues that *Gulf States* is the only decision by the Board of its kind, and imposes too harsh a burden on employers who have carried on their business with fewer employees than before the strike, and yet, are held in limbo by a purported obligation to bargain with a union whose strike has been unsuccessful.

I have no authority to overrule the Board's decision in *Gulf States,* even if I were to believe that such is warranted. Additionally, it should be noted that the Board has, more recently than *Gulf States*, repeated its adherence to the interpretation of Section 9(c)(3) set forth in *Gulf State*. In *Curtis Industries*, 310 NLRB 1212 (1993), the Board reversed the Regional Director's finding of ineligibility of challenged voters. In that case, the Regional Director had held that pending federal litigation by the Union concerning whether the strikers had been unlawfully replaced could not stay the operation of Section 9(c)(3), and that since twelve months had passed since the commencement of the strike, and because the strikers had been replaced, the replaced strikers were ineligible to vote. The Board, in reversing the Regional Director, held that if the union's litigation was successful, the strikers would not have been lawfully replaced,

[1] The hearing officer said that reemployment of the 16 challenged voters was not an "impossibility." However, it is not the Employer's burden to show an "impossibility" of reemployment.

[2] My colleagues characterize the Employer's evidence in support of its position as "argument." I disagree with this characterization. As noted, the Employer presented uncontradicted evidence regarding the changes in its operation, not mere arguments or contentions.

and as unreplaced strikers, would be entitled to vote under *Gulf States*.

The Employer's second basis for asserting that the challenges should be sustained is its assertion that the 16 strikers who cast ballots are ineligible because their positions have been eliminated and they have no reasonable expectation of recall. The Employer argues that economic reasons, unrelated to the strike, have resulted in the elimination of the work, and thus, the strikers have no expectation of recall. See *Lamb-Grays Harbor Co.*, 295 NLRB 355 (1989). Conversely, the Union contends that the Employer has failed to show that the strikers are ineligible, arguing that the only plausible reason for the diminution in the work of the Employer is the strike and its impact. The Union argues that under Board law, if the reason for the reduction in the Employer's work is the strike, then the 16 strikers who cast challenged ballots remain eligible to vote. See *Kable Printing Co.,* 238 NLRB 1092 (1978). Additionally, the Union argues that the Employer did not meet its burden of showing that the nature of its operations have changed sufficiently to show that the jobs of the strikers have been eliminated or abolished.

FINDINGS OF FACT

Erman Corporation is engaged in the business of dismantling and processing railroad cars and other rail scrap products. Erman purchases retired railroad cars and processes them for scrap, selling the scrap to customers. Erman's facility is located in the Burlington Northern/Santa Fe (BNSF) rail yard in Kansas City. The production and maintenance employees at the facility have been represented by the United Steelworkers for 30 years or more. The parties' most recent collective-bargaining agreement was effective by its terms from April 1, 1995, through March 31, 1998. Despite a number of negotiating sessions, the parties were unable to reach agreement and the Union called a strike, which commenced on April 27, 1998. All bargaining unit employees initially went on strike, but over the first several weeks of the strike, seven of the employees crossed the picket line and returned to work. The employees who returned to work were Roy McNish Sr., Roy McNish Jr., Dave Silva, Dave Mills, Mike Reynolds, Shawn Mills, and Jose Macias. In early 1999, Shawn Mills was laid off and Mike Reynolds quit his employment. Aside from the seven strikers who returned to work during the strike, the Employer has not hired any full-time, permanent employees to replace the strikers. While it has not hired full-time employees, the Employer has on a few occasions used temporary workers to assist it in processing its work. On May 17, 1999, the Union notified the Employer that the strike was over, and made an unconditional offer to return to work. None of the strikers who have unconditionally offered to return to work have been returned to work.

For years, the Employer submitted monthly bids to BNSF to purchase retired railcars for processing. The BNSF bid awards comprised between 75 and 85 percent of the raw material the Employer processed in its normal business. During the mid-1990's, and continuing to date, the Employer's business has been declining based on the strong economy and changes in federal regulatory measures concerning the life of a railcar. The Employer's business declines in good economic times because railcars are in full use and are not retired at the same rate as in poor economic times. In 1997, 27 of the 30 some unit employees of the Employer were subject to layoff for periods of up to 5 months, but all employees were recalled from layoff and were working at the time of the strike on April 27, 1998. Under the contract, the employees retain recall and seniority rights for 2 years.

In February 1998, the Employer learned that BNSF was changing it's method of awarding bids, and that instead of bidding monthly for the BNSF railcars, the railcars would be sold, based on a minimum 12-month contract. Prior to the April 27, 1998, strike, the Employer submitted its bid to BNSF. On July 21, 1998, the Employer was notified that it had not been the successful bidder to purchase the railcars. The Employer continued to purchase railcars from BNSF through September 1998. At that time, the railcars began to be purchased by the successful bidder, Progressive Rail Company.

During this same time, the Employer was notified by its largest customer, GST Steel, that it was utilizing a new method of production which caused it's need for scrap metal supplied by the Employer to be decreased. In June and July 1998, GST purchased no scrap from the Employer. However, GST shortly abandoned its experimental method of producing scrap and resumed purchasing scrap from the Employer. Since GST has abandoned its new method, GST's demand for the Employer's processed scrap has exceeded the Employer's supply.

From September 1998 through about May 1999, the Employer continued to process railcars despite the loss of its contract with BNSF. The Employer was able to continue notwithstanding its loss of the BNSF contract by processing its large backlog of railcars stationed at the rail yard. The Employer also supplemented this supply of raw materials with other small sources of scrap. The Employer recently contracted with Progressive Rail Company to purchase the railcars that Progressive receives from BNSF. In other words, the Employer is basically acting as a subcontractor of Progressive's contract with BNSF. There is no guarantee of the number of cars that Progressive will supply under the contract, just as there was no guarantee when the Employer contracted directly with BNSF. Progressive sells cars to the Employer based on geographic considerations. Since the Employer contracted with Progressive in May 1999, Progressive has sold approximately 100 railcars to the Employer for processing. At the time of the election on June 15, 1999, Progressive had provided the Employer with about 50 cars. This number of railcars is similar to the number of railcars that were supplied to the Employer on a monthly basis by BNSF in the few months prior to the strike. By the date of the hearing, the Employer had processed 44 of the 50 railcars that Progressive had sold to the Employer between May and the date of the election. There remained between 100 to 150 cars in the rail yard awaiting processing. About 40 of those railcars were available for processing, while the remainder were awaiting transfer of title before they could be processed.

At the current level of processing, the Employer anticipates that in the foreseeable future it will need no more than three temporary employees (two laborers and one burner) to assist the five current unit employees in processing the railcars. The Employer continues to pursue additional business, and has not changed its physical operations so as to make employment of the strikers an impossibility, and could, if business justified it, accommodate an employee complement the size of that prior to the strike.

CONCLUSION OF LAW

Strikers may be rendered ineligible to vote for several reasons. A striker may be rendered ineligible if they obtain per-

manent employment elsewhere. The Employer in the instant case makes no contention that any of the strikers have been rendered ineligible based their obtaining permanent employment elsewhere. A striker may also lose their right to vote based on misconduct by the employee, which would render them unsuitable for employment. The Employer contends that one voter, Vern Long, engaged in conduct which would render him ineligible. I will address the issue of Vern Long's eligibility later in this decision. Finally, a striker's employee status may be terminated when an employer eliminates or abolishes the strikers' jobs for substantial nonstrike-related reasons. *Lamb-Grays Harbor,* supra. This basis for finding strikers ineligible is the main contention of the Employer in the instant case.

The Employer bears the burden of proving that the elimination of the jobs was for substantial nonstrike-related reasons. *Lamb-Grays Harbor,* supra. The Board, citing *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1975), has reasoned that "a striker's basic right to a job cannot depend upon job availability as of the moment he applies for reinstatement." *Gulf States Paper Corp.,* 219 NLRB 806 (1975); *Globe Molded Plastics Co*., 200 NLRB 377 (1972). As such, the mere fact that employees were not replaced during the strike or recalled immediately thereafter is insufficient. Before disenfranchising employees who might otherwise be eligible to vote, the Employer's burden requires that the jobs were in fact permanently eliminated, and that its nonstrike-related reasons for the permanent elimination are substantial and not frivolous. *Lamb-Grays Harbor*, supra at 356. It is not sufficient to show economic conditions, which have resulted in a lessened need for employees. The Board in *Gulf States Paper,* supra at 806, held that such assertions do not "suffice to show that the jobs have been permanently eliminated or abolished so as to terminate the strikers' employment status and render them ineligible to vote." See also *Globe Molded Plastics Co*., supra at 378.

I find that the Employer did not sustain its burden of showing that the 16 challenged voters jobs have been eliminated or abolished. The Employer did show that it encountered a downturn in business that was for substantial nonstrike-related reasons, but it has failed to show, that this downturn has resulted in the elimination or abolishment of jobs. Employees continue to work in the positions previously held by the strikers, and the Employer has employed and anticipates employing some temporary employees to fill these same positions. The Employer continues to solicit business and has been successful in regaining much of the BNSF business it lost shortly after the strike. GST Steel stands ready to purchase all the product that the Employer can supply. The Employer's physical plant remains substantially unchanged, and the sale of heavy equipment has not been of such a magnitude so as to render reemployment of the 16 challenged voters an impossibility.

Prior to the strike the Parties' contract contemplated the ups and downs of the industry, and had negotiated contractual terms establishing that employees on layoff retained an expectation of potential recall for a period of 2 years. Additionally, in 1997, the majority of the unit was laid of at some time during the year. Yet each was recalled, evidencing the volatile nature of the industry, but again the expectation of continued employment opportunity. I find these factors also support the conclusion that the 16 challenged voters continue to maintain a reasonable expectation of recall which justifies enfranchising them in the process to determine continued representation.